No. 89-1493

In the Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, PETITIONER

v.

JOSEPH E. O'NEILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike.

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INTEREST OF THE UNITED STATES

This case involves the scope of a union's duty of fair representation in negotiating an agreement to end a labor dispute. Resolution of this case may affect the ability of unions to function as collective bargaining representatives and to avoid or terminate potentially damaging labor disputes in interstate transportation industries.

The National Mediation Board has responsibility under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, to mediate labor disputes in the rail and airline industries. The federal government therefore has a specific interest in the law affecting the settlement of such disputes, in addition to its general interest, arising from the Commerce Clause, in the uninterrupted functioning of the nation's interstate transportation network.

Although this case arises in the context of the Railway Labor Act, the duty of fair representation also applies to employees represented by unions acting under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The National Labor Relations Board has primary responsibility for administering that Act, including the determination of whether alleged breaches of a union's duty of fair representation constitute unfair labor practices. See *Breininger* v. *Sheet Metal Workers Int'l Ass'n,* 110 S. Ct. 424, 429 (1989).

In response to the Court's invitation at the petition stage in this case, the Solicitor General filed a brief expressing the views of the United States.

STATEMENT

1. Since the 1940s, petitioner has represented Continental Air Lines pilots in collective bargaining with the airline. In 1983, after filing a petition for reorganization under Chapter 11 of the Bankruptcy Code, Continental repudiated its collective bargaining agreements with petitioner and other employee unions and unilaterally imposed "emergency work rules" that cut pilots' salaries and benefits by more than fifty percent. In response, petitioner initiated a strike against Continental. Pet. App. B2.[1]

For the next two years, Continental employed permanent replacements and cross-over strikers as pilots. During that period, the bankruptcy court upheld the airline's rejection of its collective bargaining agreement with petitioner and ordered the parties to engage in collective bargaining. No new agreement was reached, and, by August 1985, working pilots outnumbered strikers by 1,600 to 1,000. At

[1] There are four separately paginated appendices to the petition, numbered 1 through 4. To simplify citations, we will cite to them as though they had been denominated A through D.

that time, Continental gave notice that it would no longer recognize petitioner as the pilots' bargaining representative. Pet. App. B2-B3.[2]

On September 9, 1985, Continental posted its Supplementary Base Vacancy Bid 1985-5 (85-5 bid) covering some 441 anticipated vacancies for captains and first officers and an undetermined number of second officer vacancies. Pilots interested in those vacancies were invited to submit bids by September 18, 1985, specifying their preferred position, base of operations, and aircraft. In accordance with Continental's customary practice, the positions were to be awarded on the basis of seniority. In order to allow for necessary training, the 85-5 bid was posted substantially in advance of the date when pilots were expected actually to assume the positions covered by the bid. Pet. App. B3-B4.

Fearing that the 85-5 bid would fill all expected jobs for some time in the future, the Continental Master Executive Council (MEC)—a committee that served, subject to the authority of petitioner's executive board and board of directors, as the coordinating council for Continental pilots—authorized strikers to submit bids, and several hundred did so. Continental challenged the strikers' bids in court, and ultimately announced that it had "awarded" the 85-5 bid positions to working pilots. However, at the time the strike ended, on October 31, 1985, none of the individuals assigned positions under the 85-5 bid had actually begun to work in the positions assigned. Pet. App. B3-B4; see Pet. 4; Br. in Opp. 3.

[2] The Court considered the validity of such withdrawals of recognition last Term in *NLRB* v. *Curtin Matheson Scientific, Inc.,* 110 S. Ct. 1542 (1990), (affirming an NLRB decision that an employer could not defend a withdrawal of union recognition by presuming that replacement workers hired during a strike oppose continued representation by the union).

In late September 1985, the MEC voted not to return to work, but also authorized its officers and a negotiator to pursue a settlement with Continental. Pet. App. B4. See Pet. C.A. Br. 8; Resp. C.A. Br. 9. During October 1985, representatives of petitioner and Continental agreed to terms for ending the strike and resolving litigation involving Continental, petitioner, and individual pilots. On October 31, 1985, the bankruptcy court entered an order and award embodying the parties' agreement. Pet. App. D. Petitioner consented to entry of the order and award without providing notice to the striking pilots or the MEC or submitting the agreement for ratification. Pet. App. B4.

Under the order and award, each striker was entitled to select one of three options. Strikers electing Option 1, the most important for present purposes, waived claims against Continental and obtained the right to be reinstated in certain positions on the basis of seniority. The agreement allocated the first 100 captain positions in the 85-5 bid to working pilots. The next 70 captain positions (the remainder covered by the 85-5 bid) were earmarked for returning strikers; however, unlike working pilots, strikers were obligated to accept the base and aircraft type assigned by Continental. The agreement further provided that until October 1, 1988, subsequent vacancies for captain positions would be allocated among working pilots and returning strikers on a one-to-one ratio. Again, whereas working pilots could bid for the base and aircraft type they preferred, returning strikers were required to accept management's choice of base and aircraft. The issue of how vacancies occurring after October 1, 1988, were to be allocated among working pilots and returning strikers was submitted to binding arbitration. Pet. App. B4-B5, D6-D8.

The effect of these provisions was to allocate to returning strikers some of the 85-5 bid positions that, according to Continental, had been awarded to working pilots. At the same time, the agreement guaranteed working pilots more desirable positions than they could have attained if

all 85-5 bid positions and subsequent vacancies had been assigned to working pilots and returning strikers on the basis of seniority alone. It was foreseeable that the effects of placing working pilots in those positions would persist, since (in the absence of a layoff) pilots could not be displaced from positions they occupied. See Pet. App. B5.[3]

2. Respondents have been certified as representatives of a class of Continental pilots who remained off the job until the end of the strike. In their complaint, respondents alleged that petitioner breached its duty of fair representation in negotiating and consenting to the order and award. The complaint also asserted that petitioner's failure to submit the agreement for ratification was a violation of Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(1), and advanced two additional causes of action, which were not pressed on appeal. The district court granted summary judgment in petitioner's favor on all claims. See Pet. App. C.

3. The court of appeals reversed with respect to respondents' fair representation claim. Quoting from this Court's decision in *Vaca* v. *Sipes*, 386 U.S. 171, 177, 190 (1967), the panel stated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Pet. App. B9. Because *Vaca* "recognizes three distinct standards of conduct," the court continued, "a breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts." *Id.* at B9-B10. Adhering to standards it had announced in *Tedford* v. *Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976), the court stated that a union's decision could be considered arbitrary unless it was

[3] With respect to matters other than their initial placement, returning strikers were entitled to exercise their full seniority rights upon being recalled to work. See Pet. App. D9.

> (1) based upon relevant, permissible union factors which exclude[ ] the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of those factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Pet. App. B10.

In this case, the court determined, a jury could find that petitioner had acted arbitrarily by agreeing to an order and award that "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. The court explained that, in its view, returning strikers would have been legally "entitled to reinstatement as vacancies occurred" (*id.* at B12); that Continental "could not have changed its policy of assigning work by seniority * * * unless it had a legitimate and substantial business justification for doing so" (*id.* at B13); and that a trier of fact could find that Continental "likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work" (*id.* at B14). The court rejected petitioner's contention that the agreement benefitted returning strikers by giving them access to some of the positions encompassed by the 85-5 bid, ruling that, "under ordinary seniority rules," returning strikers would have been "entitled to fill the vacancies announced in the 85-5 bid." *Ibid.*[4] The court concluded (*ibid.*):

[4] In support of this conclusion, the court cited *ALPA* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987). The district court's decision in *United Air Lines* was entered on August 8, 1985, and the case was pending on appeal at the time petitioner agreed to the entry of the order and award in the bankruptcy court. The court of appeals also cited *Independent Fed'n of Flight Attendants (IFFA)* v. *Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), rev'd in part, 109 S. Ct. 1225 (1989), a decision issued after entry of the order and award.

> A factfinder could infer that had [petitioner] unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for [85-5 bid] vacancies and also preserve their litigation rights against [Continental].

In addition, the court of appeals held that respondents had raised a material issue of fact as to whether the order and award unjustifiably discriminated against returning strikers. "Depending upon the explanation offered by [petitioner]," the court concluded, "a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation." Pet. App. B15.[5]

SUMMARY OF ARGUMENT

1. In *Vaca* v. *Sipes*, 386 U.S. at 177, this Court stated that a union's duty of fair representation encompasses a tripartite obligation to refrain from acting towards those it represents (1) with hostility or bad faith, (2) in a discriminatory manner, or (3) arbitrarily. This Court has repeatedly stated that *Vaca* applies to a union's contract negotiation, as well as contract administration, functions. When a union is chosen by a majority of the employees in a unit as the representative of the employees in that unit, federal law not only precludes the minority from choosing another representative, but also generally precludes *all* employees from bargaining with the employer as individ-

[5] The court of appeals affirmed the district court's dismissal of respondents' LMRDA claim. Pet. App. B15-B19. Respondents have not sought further review of that decision.

uals. Since these preclusive effects operate over the entire range of a union's representative functions, the represented employees deserve protection against bad faith, arbitrary, or discriminatory conduct by the union throughout that range. This result recognizes that a union, acting as exclusive representative, is subject to duties of loyalty (in the labor law context, avoidance of bad faith) and duties of care (in the labor law context, avoidance of arbitrary or discriminatory conduct) analogous to duties the law imposes on others who undertake representative or fiduciary functions.

An additional consideration suggests the need for a single standard applicable over the entire range of a union's representative functions. Contract negotiation and contract administration are not two discrete categories that exhaust a union's representational functions. Issues arising in grievance proceedings may well involve both enforcement of contractual norms for the benefit of individual employees and adjustment of rights and obligations left unclear or undetermined by the contract; grievance proceedings may thus implicate both administration and negotiation. Similarly, contract negotiations may involve not only the general division of rights and obligations between employer and employee and the allocation of such rights and obligations among employees, but also the settlement of distinctly individual problems. In short, the negotiation/administration distinction is far too blunt an instrument to distinguish those instances in which union bad faith alone constitutes a breach of the duty from those instances in which arbitrary or discriminatory conduct not undertaken in bad faith may violate the duty.

2. In applying the *Vaca* standard in any context, however, a court should accord the union a "wide range of reasonableness" to protect the union's ability effectively to represent bargaining unit members. Moreover, that standard should be applied from the standpoint of the union at the time it undertook the challenged conduct, with all of

the constraints of time, information, resources, and uncertainty in which the union was functioning. A lesser degree of deference to union decisionmaking could impair the performance of one of the collective bargaining representative's most important tasks: reconciling conflicting interests of bargaining unit members. It would also be inconsistent with the national labor policy that fosters a system of autonomous private decisionmaking by workers acting through their exclusive representative.

3. The court of appeals erred in assuming that the question raised by this case was whether the union's assessment of the potential costs and benefits of submitting an unconditional offer to return to work was, ultimately, correct. Rather, the crucial issue was whether the union's choices in negotiating the settlement with Continental, viewed from the standpoint of union leaders at the time of the negotiations, fell within a broad range of reasonableness. A union engaged in contract negotiations must have the capacity to respond quickly and flexibly to management proposals; if the price of that capacity is that unions will not incur liability on those occasions when they obtain less than they might have for those they represent, that price is a necessary consequence of federal labor policy and of the realities of industrial relations.

4. The court of appeals also erred in holding that the back-to-work agreement impermissibly discriminated against the striking pilots by creating a permanent division in the work force between strikers and non-strikers. See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 230 (1963). The only substantial permanent effect of the agreement appears to be an effect that is plainly permissible—those who worked during the strike retained their positions despite the fact that they had less seniority than some of the full-term strikers. There is no indication that, once the recall process was completed and all strikers had returned to work, the agreement created any permanent split in the

labor force or had any further effect on the exercise of seniority rights for purposes of future reductions in force, filling future vacancies, or determination of any other employment benefits. Thus, the back-to-work agreement did not impermissibly discriminate against striking pilots.

ARGUMENT

A. CONDUCT BY A UNION TOWARD A MEMBER OF THE BARGAINING UNIT THAT IS ARBITRARY, DISCRIMINATORY, OR IN BAD FAITH MAY VIOLATE THE UNION'S DUTY OF FAIR REPRESENTATION, REGARDLESS OF WHETHER THE UNION IS ENGAGED IN CONTRACT NEGOTIATION, CONTRACT ADMINISTRATION, OR SOME OTHER REPRESENTATIVE FUNCTION

1. In *Vaca* v. *Sipes,* this Court summarized the origin and scope of the fair representation doctrine. The Court held:

> [T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

386 U.S. at 177.[6] *Vaca* itself involved an allegation that a union's failure to pursue a meritorious grievance through arbitration, pursuant to a collective bargaining agreement, violated the union's duty of fair representation. Nonetheless, the Court expressly noted that its statement of the scope of the duty was not limited to the union's grievance processing function: the union "had a statutory duty fairly

[6] Later in the *Vaca* opinion, the Court reiterated that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

to represent all of [the members of the bargaining unit], both in its collective bargaining * * * and in its enforcement of the resulting collective bargaining agreement." *Ibid.*

Although the Court has never been squarely presented with the question whether *Vaca*'s tripartite standard applies to the negotiation of a collective bargaining agreement, the Court since *Vaca* has continued to insist that the standard applies "during the negotiation, administration, and enforcement of collective-bargaining agreements," *International Bhd. of Elec. Workers* v. *Foust,* 442 U.S. 42, 47 (1979),[7] or whenever a union is acting in its representative capacity, *Breininger* v. *Sheet Metal Workers,* 110 S. Ct. 424, 429 (1989).[8] None of the Court's formulations has suggested any essential difference in the standards applicable to negotiating and administering collective agreements. Nor do the statutes conferring authority on unions as exclusive representatives of bargaining unit employees suggest any distinction based upon the nature of the representative function.[9]

2. The Court's repeated statements that the duty is breached by union conduct that is arbitrary or discriminatory, as well as conduct that is dishonest or in bad faith, are based on the source of the duty in the union's statutory role as exclusive representative. In *Steele* v. *Louisville &*

[7] Accord *United Steelworkers* v. *Rawson,* 110 S. Ct. 1904, 1911 (1990); *Chauffeurs, Local No. 391* v. *Terry,* 110 S. Ct. 1339, 1344 (1990).

[8] See also *Communications Workers* v. *Beck,* 487 U.S. 735, 743 (1988); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 563-564 (1976); *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 299 (1971); *Humphrey* v. *Moore,* 375 U.S. 335, 342, 350 (1964).

[9] See, *e.g., Steele* v. *Louisville & N. R.R.,* 323 U.S. 192, 198-207 (1944) (Railway Labor Act); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337 (1953) (extending doctrine to National Labor Relations Act).

N. R.R., 323 U.S. 192, 202 (1944), the Court squarely grounded the duty of fair representation in the union's function as exclusive representative; the Court noted that "the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." See also *id.* at 204 (duty "inseparable from the power of representation"). This link between the union's role as exclusive agent—entailing the removal from bargaining unit members of "all [other] effective means of protecting their own interests," *DelCostello* v. *International Bhd. of Teamsters,* 462 U.S. 151, 164 n.14 (1983)[10]—and its duty of fair representation is a consistent thread running through this Court's cases concerning the nature and scope of that duty. See, *e.g.*, *United Steelworkers* v. *Rawson,* 110 S. Ct. at 1911; *Bowen* v. *United States Postal Service,* 459 U.S. 212, 226 (1983); *International Bhd. of Elec. Workers* v. *Foust,* 442 U.S. at 46 & n.8; *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Vaca* v. *Sipes,* 386 U.S. at 176; *Humphrey* v. *Moore,* 375 U.S. 335, 342 (1964); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337 (1953).

The grant to a union of the statutory right of exclusive representation carries with it a correlative duty to those the union represents. This duty is in many respects akin to the fiduciary duties owed by an agent to his principal, see Restatement (Second) of Agency §§ 378-398 (1958), or by a trustee to the trust beneficiaries, see Restatement (Second) of Trusts §§ 170-185 (1954); *Chauffeurs, Local No. 391* v. *Terry,* 110 S. Ct. 1339, 1346 (1990) (plurality opinion); *id.* at 1355-1356 (Kennedy, J., dissenting). Just as

[10] See *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 338-339 (1944); *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50 (1975); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

an agent or trustee has both a duty of loyalty, see Restatement (Second) of Agency §§ 387-398; Restatement (Second) of Trusts § 170, and a duty of care, see Restatement (Second) of Agency § 379; Restatement (Second) of Trusts § 174, so a union has both a duty to act honestly and in good faith (comparable to a duty of loyalty) and a duty to avoid arbitrary or discriminatory conduct (comparable to a duty of care). In each case, imposition of the duty to the represented party is a necessary complement to the selection of the representative to protect that party's interests.

To be sure, analogies between a union's duty of fair representation and an agent's or trustee's fiduciary duties are imperfect at best,[11] and the precise scope of the duties of loyalty and care imposed upon a union, agent, or trustee vary with the circumstances. Moreover, courts should be mindful of the danger that unduly stringent judicial supervision may interfere with the representative's ability to perform its function. Nonetheless, the law does impose an obligation on one who performs a representative function not merely to act in good faith, but also to act reasonably to advance the interests of the represented party. Although the scope of the latter duty may be shaped to accommodate the unique needs of the system ordained by the federal labor laws, it would be incongruous—particularly since a majority of employees in a unit may designate a representative to act for *all* employees in that unit—to dispense with it altogether.

For this reason, the *Vaca* three-part standard—and not merely the requirement that the union act in good faith—should apply to a union whenever it is exercising its representative functions.

3. In its petition for certiorari, petitioner contended that the scope of the duty of fair representation depends

[11] Cf. *Terry,* 110 S. Ct. at 1357 (Kennedy, J., dissenting).

entirely on whether a union is performing a contract negotiation function or a contract administration function. Petitioner asserted that the union's exercise of "negotiating judgment" should be subject to review by a trier of fact *only* to the extent that the conduct at issue "fails to meet the standard of 'complete good faith and honesty of purpose.' " Pet. 19. This limitation, it argued, should be required because of "the complexity of the task [of reconciling conflicting interests among unit members], the range of more or less reasonable options available, and the authority of unions to act as autonomous agents on behalf of their members." *Id.* at 16 (quoting *Thomas* v. *United Parcel Service, Inc.*, 890 F.2d 909, 917 (7th Cir. 1989)).[12] Petitioner contrasted this situation with the "ministerial" role of the union in contract administration, and the correspondingly more stringent standard prohibiting arbitrary and discriminatory, as well as dishonest or bad-faith, conduct. *Ibid.*

Petitioner's suggested distinction is largely illusory, and thus does not support a significant divergence between the standards applied in contract negotiation and contract administration. In contract administration, a particular grievance may implicate the sometimes-conflicting interests of all of the members of the bargaining unit, and the processing and resolution of such a grievance may more closely resemble the negotiation of a contract than the determination of an individual's claim. For example,

[12] It should be noted that others who act in a representative or fiduciary capacity similarly may be responsible for reconciling conflicting interests of those they represent. Although an agent ordinarily may not represent principals with conflicting interests, a trustee may well find that the trust beneficiaries have opposing interests. In that circumstance, the trustee remains subject to a duty of care, and he acquires the additional duty to deal impartially with each beneficiary. Restatement (Second) of Trusts § 183 (1954).

Humphrey v. *Moore*, 375 U.S. 335 (1964), involved a claimed violation of a union's duty of fair representation in the processing of a grievance relating to the appropriate method of merging the seniority lists of two firms that had combined certain operations. Unlike a more typical grievance proceeding involving a particular employee's claim of mistreatment by an employer, the claim in *Humphrey* required the resolution of broad questions affecting most or all of the members of the bargaining unit.[13]

In contract negotiations, on the other hand, the issues frequently do not necessitate accommodation of the conflicting interests of competing members of the bargaining unit. Especially at the plant level, contract negotiations may involve bargaining over some matters that affect only one, or a very few, employees, and that do not have a broad impact on the bargaining unit as a whole.[14] For example, a union may seek to negotiate a longer period of preparation time for a few employees whose special duties require a number of preliminary activities (clothes changes, sterilization, etc.) before starting work. Similarly, although the order and award in this case treated reinstatement rights in general terms, back-to-work agree-

[13] The type of claim at issue in *Humphrey*, arising out of an allegation that a union breached its duty of fair representation in reconciling seniority lists when two firms combine, is not uncommon. See, *e.g.*, *Haerum* v. *Airline Pilots Ass'n*, 892 F.2d 216, 221-222 (2d Cir. 1989); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 458 (4th Cir. 1988); *Thomas* v. *Bakery Workers Union*, 826 F.2d 755, 758-759 (8th Cir. 1987); *Masy* v. *New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 327-328 (3d Cir. 1986); *Alvey* v. *General Electric Co.*, 622 F.2d 1279 (7th Cir. 1980).

[14] A further difficulty with the negotiation/administration distinction is that some union representative functions—for example, the operation of a hiring hall—may not readily fall into either category. See *Breininger* v. *Sheet Metal Workers Int'l Ass'n*, 110 S. Ct. 424 (1989).

ments frequently determine reinstatement rights of particular named employees.

This Court has recognized the difficulty of drawing any sharp line between contract negotiation and contract administration. As the Court has observed, "[t]he grievance procedure is * * * a part of the continuous collective bargaining process," *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); accord *Del-Costello* v. *International Bhd. of Teamsters*, 462 U.S. at 169; *United Parcel Service* v. *Mitchell*, 451 U.S. 56, 63-64 (1981). Similarly, the bargaining process "involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract." *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957). Because the two functions are often similar both in practice and in principle, it would be difficult in fact—and unfortunate in theory—for the standard of conduct required of the union to depend on which characterization seems more apt in a particular case.

B. A UNION'S CONDUCT IS ARBITRARY ONLY IF THAT CONDUCT, VIEWED FROM THE STANDPOINT OF THE UNION AT THE TIME ITS DECISION IS MADE, FALLS OUTSIDE A "WIDE RANGE OF REASONABLENESS"

1. In *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953), the Court recognized that, in light of the "differences * * * in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, * * * [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion" (emphasis added). Petitioner reads this language (see Pet. 19) to eliminate any inquiry into whether a union has acted arbitrarily while carrying out its bargaining function.

We submit that the Court's statements in *Ford Motor* do not naturally bear the meaning petitioner asserts. Actions that are arbitrary scarcely can be characterized as falling within a range of "reasonableness," however wide that range may be. Instead, the quoted passage is better understood as recognizing two distinct branches of the duty of fair representation: the duty to avoid conduct that falls outside a "wide range of reasonableness," and the duty to avoid conduct that is not performed in "good faith and honesty of purpose." *Ford Motor* thus does not conflict with the tripartite classification in *Vaca*.

2. Nonetheless, in holding that a union must be allowed a "wide range of reasonableness," *Ford Motor* did recognize that a union must be afforded considerable leeway for the exercise of judgment if it is to act effectively on behalf of bargaining unit members. Such leeway is essential to the performance of the critical function of accommodating conflicting interests among unit members, who often will share unequally in the duties and obligations the union is able to attain from the employer. See also *Humphrey* v. *Moore*, 375 U.S. at 349-350. Moreover, a union must be able to seize fleeting opportunities for reaching agreement and to respond quickly to management initiatives.[15] And a union must act within constraints imposed by deadlines and scarce resources that can limit

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[15] Indeed, one of the purposes of the Railway Labor Act is "to provide for the *prompt* and orderly settlement of all disputes concerning rates of pay, rules, or working conditions." 45 U.S.C. 151a(4) (emphasis added). See also 45 U.S.C. 152 Second ("All disputes * * * shall be considered, and, if possible, decided, *with all expedition*, in conference between representatives designated and authorized so to confer, respectively, by the carrier * * * and by the employees") (emphasis added).

its ability to devote extensive study, investigation, and analysis to each action it takes. Finally, a union's decisionmaking—particularly during a strike—must be guided by essentially unverifiable assessments of whether the economic power it can wield will be sufficient to attain its objectives. To a significant extent, then, the vehicle for controlling a bargaining representative is not judicial review; rather, reliance must be placed on democratic procedures guaranteed by federal law for selection of that representative and for election of union leaders. See *Wirtz* v. *Hotel Employees Union,* 391 U.S. 492, 497 (1968).

3. The question whether a union's conduct falls within the permissible "range of reasonableness" should be considered from the standpoint of the union at the time it took the challenged action. As in other contexts in which the law protects decisionmakers from the corrosive effect of judicial second-guessing, strict *post hoc* review of union decisions threatens the union's ability to act effectively on behalf of those it represents. Therefore, the *Vaca* standards should be applied with keen sensitivity to the situation confronting the union at the time it acted. In this respect, there is an analogy between the standards applicable to union conduct and the standards applicable to others who may be liable for injuries inflicted, but whose exercise of independent judgment is entitled to protection.

For example, it has long been recognized that, although corporate directors owe duties of loyalty and care to shareholders, their disinterested business judgment will not be judicially scrutinized if the directors "had a rational basis for believing that the business judgment was in the best interests of the corporation." ALI, Principles of Corporate Governance: Analysis and Recommendations § 4.01(d)(3) (Tent. Draft No. 3, 1984); accord *Panter* v. *Marshall Field & Co.,* 646 F.2d 271, 293 (7th Cir. 1981); *Sinclair Oil Corp.* v. *Levien,* 280 A.2d 717, 720 (Del. 1971). See generally Arsht, *The Business Judgment Rule Revisited,* 8 Hofstra L. Rev. 93 (1979). Furthermore, the inquiry into whether a director had such a rational basis must be conducted from the standpoint of "an ordinarily prudent person * * * in like position and under similar circumstances." ALI, Principles of Corporate Governance, *supra,* § 4.01(a); 3A W. Fletcher, *Cyclopedia of Corporations* § 1030, at 19 (perm. ed. 1975).

Similarly, there is a useful analogy between the *Ford Motor* standard and the standard governing the availability of qualified immunity to public officials. Although such officials are not generally accorded absolute immunity, see *Butz* v. *Economou,* 438 U.S. 478 (1978), their official actions are entitled to immunity "insofar as their conduct does nct violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818-819 (1982). In *Harlow,* the Court emphasized that, in deciding whether the law was clearly established, a court must determine "not only the currently applicable law, but whether that law was clearly established *at the time an action occurred.*" 457 U.S. at 818 (emphasis added).

Thus, in all three contexts, the appropriate standards of conduct—a "wide range of reasonableness" in the case of unions, a "rational basis" in the case of corporate directors, the need for the allegedly violated law to have been "clearly established" in the case of public officials—reflect concern that the entity or official involved will be rendered ineffective if faced with potential liability for merely mistaken judgments. Similarly, in all three areas, judicial inquiry proceeds *ex ante,* from the standpoint of the decisionmaker at the time of the decision, and takes into account the constraints of time, limited information, and

limited resources under which the decisionmaker was operating.[16]

* * * * *

In sum, *Ford Motor* struck an apropriate balance by subjecting union conduct to a "wide range of reasonableness" standard. To impose a more stringent standard of objective judgment would threaten a union's ability effectively to perform its core representational function. Yet, to impose a wholly subjective "bad faith" standard would err in the other direction, shielding a union when it has failed to fulfill its representational function or, worse, succeeded in concealing a bad-faith motive for its conduct.

C. BECAUSE THE AGREEMENT AT ISSUE IN THIS CASE, VIEWED FROM THE STANDPOINT OF THE UNION DECISIONMAKERS AT THE TIME IT WAS NEGOTIATED, REFLECTED A REASONABLE JUDGMENT THAT THE AGREEMENT WAS PREFERABLE TO AN UNCONDITIONAL RETURN TO WORK, THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNION ACTED ARBITRARILY BY CONSENTING TO THAT AGREEMENT

Although the court of appeals correctly held that a union's conduct of negotiations, as well as its processing of grievances, is subject to the tripartite *Vaca* standard, the court erred in its application of that standard to this case.

1. The court of appeals approached this case as if the central issue was whether the union gained anything of value by consenting to the order and award, in return for giving up rights that would have been available to the

[16] As the Court made clear in *Harlow*, even if the law asserted to be violated was clearly established at the time of the challenged official action, an immunity defense would be established "if the official * * * claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." 457 U.S. at 819.

striking pilots had they simply submitted an unconditional offer to return to work. This approach, we believe, was fundamentally mistaken. To be sure, we assume that a union would be acting arbitrarily, and thus in breach of its duty of fair representation, if it gave up a clearly established right of bargaining unit members without gaining anything in return. But the inquiry should always be focused on the costs and benefits of the union's action *as they would have appeared to the union at the time it acted.*[17] The issue before the court of appeals was thus not whether the order and award in fact disadvantaged the returning strikers, but whether the union acted within a "wide range of reasonableness" in agreeing to the compromise in light of the legal and practical uncertainties confronting the union at that time.[18] Viewed from this perspective, the union's conduct was not arbitrary.

a. The court of appeals rested its decision on its conclusion that "a jury could find that the order and award

[17] Of course, the benefits that a union gains in a particular agreement may not simply be the acquisition of additional contractual rights. For example, there are cases in which the employer is in financial distress and a union representing the employees agrees to give up rights guaranteed by a collective agreement. In such cases, courts have generally found that the union has obtained a benefit in return: the survival of the employer and thus of the jobs of bargaining unit members. See, *e.g.*, *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989); *Schultz* v. *Owens-Illinois Inc.*, 696 F.2d 505, 516 (7th Cir. 1982); *Hendricks* v. *ALPA*, 696 F.2d 673, 677 (9th Cir. 1983).

[18] Compare *Morgan* v. *St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987) (rejecting claim that union violated duty by negotiating agreement that left employees with less generous benefits than they would have had absent agreement; ~~on the ground that~~ union's belief that agreement was advantageous was not "unreasonable or arbitrary") *Anderson* v. *Ideal Basic Industries*, 804 F.2d 950, 953 (6th Cir. 1986) (same).

left the striking pilots worse off in a number of respects than complete surrender to [Continental]." Pet. App. B11. According to the court, "[a] factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for [the 85-5 positions] and also preserve their litigation rights against [Continental]." Pet. App. B14. Since the agreement gave the returning pilots only *some* of the positions encompassed by the 85-5 bid, and provided those positions only subject to certain restrictions, the court found that the order and award deprived the returning pilots of some rights they would have had if an unconditional offer of return to work had been made, while offering nothing of value by way of compensation.

b. Had it conducted its inquiry from the perspective of the union at the time it entered into the order and award, the court of appeals should have recognized that the clear landscape that it discerned would have appeared cloudy and full of risks. In particular, the court's conclusion that "the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred"—enabling the returning strikers to compete for positions that Continental contended had already been "awarded" in the 85-5 bid—would have been far from clear to the union. Pet. App. 12.

Under this Court's decisions, Continental was entitled to employ permanent replacements and cross-over strikers to continue operations during the strike and was not required to discharge those employees to make room for returning strikers. *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Trans World Airlines, Inc.* v. *Independent Fed'n of Flight Attendants*, 109 S. Ct. 1225 (1989). On the other hand, Continental would have been required to offer returning strikers *vacant* positions

equivalent to those the strikers had held before going on strike (absent countervailing legitimate and substantial business justifications for refusing to do so). *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Unjustified refusals to reinstate strikers who offer unconditionally to return to work "discourage employees from exercising their rights to organize and to strike." *Ibid.*

The issue left unsettled by this Court's decisions is whether 85-5 positions "awarded" to working pilots would have been considered "vacancies" available to returning strikers. Continental's position, as we understand it, has been that the bid procedure serves its legitimate interest in designating particular employees for anticipated vacancies in advance, so that the airline can begin at once to provide necessary training and arrange to fill positions vacated by pilots who have bid successfully for better jobs. Under that position, refusing to open those vacancies to rebidding in order to accommodate returning strikers could not be characterized as an unjustifiable infringement of the right to strike. The countervailing argument, as we understand it, is that an award of a position confers only a limited, conditional expectancy of obtaining that position at some future time and thus it would not have undercut Continental's legitimate interests to place returning strikers in positions that were not actually filled or for which training had not commenced. If that view of the bidding process is valid, a refusal to allow returning strikers equal access to positions not actually occupied when they agreed to return might be viewed as an unjustified infringement of the right to strike.

Regardless of how this dispute is resolved on its merits, we believe that, in view of the uncertain circumstances, there is no basis on which a trier of fact could find that the union's decision to opt for a compromise was *arbitrary*. A union in petitioner's position could legitimately take ac-

count of the risks and delay inherent in litigation in deciding whether to agree to a negotiated settlement. Indeed, the union's decision to consent to the order and award might fall within the "wide range of reasonableness" even if the union could have been certain that, after protracted litigation, it could have obtained a judgment entitling the returning strikers to the 85-5 bid positions.

It is not necessary, however, to reach the issue whether the risk of lengthy litigation would alone support a union decision to compromise claims of bargaining unit members. For in this case, the only contemporaneous support that the court of appeals found for its legal conclusion that the 85-5 bid positions were "vacant" was *ALPA* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 (N. D. Ill. 1985), aff'd in part, 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987), a district court decision from another circuit that was on appeal at the time the union consented to the order and award. See note 4, *supra*. Since the outcome of the appeal of that decision was uncertain, and since the decision of another circuit would not in any event be controlling in the Fifth Circuit (where most of the litigation between petitioner and Continental had occurred), the union's failure to rely on *United Air Lines* and to reject the order and award surely was not arbitrary. Compare *Burkevich* v. *ALPA*, 894 F.2d 346, 351-352 (9th Cir. 1990). Moreover, the *United Air Lines* decision rested on a factual premise that may well not have been present in this case.[19] Thus, there is little doubt that the union's

[19] In *United Air Lines*, the carrier rebid the entire airline in the early days of a strike, and the district court concluded (in light of other facts) that the rebid was motivated by anti-union animus. 614 F. Supp. at 1046. The court of appeals affirmed on this basis. 802 F.2d at 898-900. The availability of such a rationale to attack the purported "award" of the 85-5 bid positions in this case was – at the very least – subject to doubt.

failure to reject the order and award on the basis of *United Air Lines* was well within the "wide range of reasonableness" to which the union is entitled.

c. The decision of the court of appeals is legally doubtful in another respect. This Court has recognized that an "allegation of mere negligence will not state a claim for violation of [the duty of fair representation]." *United Steelworkers* v. *Rawson*, 110 S. Ct. at 1913.[20] To impose liability for negligent representation of employees would impair the national labor policy that substantive decisions as to the appropriate resolution of labor disputes should be made by the employees acting through their exclusive representative. Cf. *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 755-760 (1961).

The judgment of the court of appeals in this case was inconsistent with *Rawson* because it allowed imposition of liability on the union for what was at worst simply a negligent failure accurately to assess the evolving legal status of the returning strikers and accurately to predict Continental's response to an unconditional offer to return to work.[21] Assuming that the court of appeals was correct in holding that the 85-5 bid positions – "awarded" but not yet occupied – were legally "vacant" and thus open to returning strikers, the court's reasoning nonetheless would

[20] The NLRB has consistently taken the position adopted by the Court in *Rawson*. See, *e.g.*, *Sheet Metal Workers' Int'l Ass'n*, 291 N.L.R.B. No. 41 (Sept. 30, 1988), aff'd on other grounds, 902 F.2d 810 (10th Cir. 1990), petition for cert. pending, No. 90-400; *Rainey Security Agency*, 274 N.L.R.B. 269 (1985); *Paint Workers Union*, 270 N.L.R.B. 506 (1984); *Office Employees Int'l Union, Local No. 2*, 268 N.L.R.B. 1353 (1984); *Teamsters Local 282*, 267 N.L.R.B. 1130 (1983), enforced, 740 F.2d 141 (2d Cir. 1984); *General Truck Drivers Union, Local 692*, 209 N.L.R.B. 446, 447-448 (1974).

[21] It should be noted that *Rawson* was decided on May 14, 1990, over five months after the Fifth Circuit's decision in this case.

have failed to show that the union was guilty of anything more than "mere negligence." Insofar as the union acted as it did because it failed to appreciate the legal significance of the district court decision in *United Air Lines,* the union was at worst simply negligent. And insofar as the union was motivated by a fear—exaggerated, in the court's view—that the returning strikers would be able to vindicate their legal rights to the 85-5 bid positions only after costly and protracted litigation, the union still was at worst guilty of negligently failing to make an accurate assessment of the costs and benefits of submitting an unconditional offer to return to work.[22]

d. The facts of this case illustrate the dangers of basing liability for breach of a union's duty of fair representation on a *post hoc* inquiry into whether the union in fact made the correct decision—in this case, concerning the legal rights of returning strikers and the risks inherent in asserting such rights—in carrying out its representative function. National labor policy, as embodied in the Railway Labor Act, imposes a duty upon the parties "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. 152 First. See *Brotherhood*

[22] Respondents argued below that petitoner's leadership consented to the entry of the order and award based upon self-interest and political motivations, concealed their actions from the rank-and-file and their representatives, and falsely assured striking pilots that any agreement would be submitted for ratification. See Pet. App. B7. The court of appeals did not decide whether there were disputed issues of fact requiring a trial on those allegations of bad faith. These theories of liability could be considered on remand if the Court decides to reverse the judgment of the court of appeals.

of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969); *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 574 (1971); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758-761 (1961). When, as in this case, such disputes have led to a strike, there is a strong public interest in re-establishing the smooth flow of interstate commerce. Yet a union's ability to negotiate an end to the strike may be seriously impaired if it knows that a choice later determined to have been mistaken will expose it to substantial liability. Decisions imposing such liability can only complicate the efforts of management, unions, and federal mediators to achieve negotiated resolutions of labor disputes.[23]

D. THE ORDER AND AWARD DID NOT IMPERMISSIBLY DISCRIMINATE AGAINST RESPONDENTS

The court of appeals also erred in holding that the union breached its duty of fair representation in this case "by negotiating a settlement which impermissibly discriminated against strikers." Pet. App. B14-B15. The court found that the order and award "preserved strikers and nonstrikers as two distinct groups after recall." Pet. App. B15. According to the court, this amounted to discrimination inconsistent with this Court's decision in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

In *Erie Resistor,* the Court affirmed the NLRB's finding that an employer had committed an unfair labor practice when it granted replacement workers extra seniority during a strike. After the strikers returned to work, the "super-seniority" enabled the replacement workers successfully to retain their jobs in place of otherwise more senior strikers during a subsequent lay-off. 373 U.S. at

[23] Cf. *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. at 51-52.

224. This permanent "cleavage in the plant" that "continu[ed] long after the strike [had] ended * * * [stood] as an ever-present reminder of the dangers connected with striking and with union activities in general" (*id.* at 231), and thus unduly interfered with the employees' right to strike. As the Court has since explained, "a continuing diminution of seniority upon reinstatement at the end of the strike was central" to the decision in *Erie Resistor*. *Trans World Airlines* v. *Independent Fed'n of Flight Attendants,* 109 S. Ct. at 1232.

The Court in *Erie Resistor* affirmed a decision by the NLRB that the *employer* had committed an unfair labor practice. Thus, the case did not address the scope of a union's duty of fair representation, and yet the court of appeals failed even to consider the threshold question whether a union's consent to a superseniority provision like that at issue in *Erie Resistor* would constitute the sort of "discrimination" that would violate that duty. And even if it would, we believe the court of appeals erred in concluding that the order and award in this case, like the unlawful conduct in *Erie Resistor,* permanently diminished the seniority of the striking pilots.

The order and award does not appear to have created a "continuing diminution of seniority" for the striking pilots, and thus did not violate the principles set down in *Erie Resistor*. To be sure, the order and award did alter the order of reinstatement, permitting working pilots to retain just over half of the 85-5 bid positions while returning strikers received the other half. In addition, the order and award provided that future positions would be open to working pilots and returning strikers in a 1:1 ratio, until all strikers had returned to work. But those terms simply governed the order and mechanism for reinstatement of returning strikers; they did not permanently alter the seniority system.

As petitioner has pointed out (Pet. 27), the order and award in this case sets up a mechanism analogous to that upheld by this Court in *Trans World Airlines*. As in *Trans World Airlines,* "any future reductions in force * * * will permit reinstated full-term strikers to displace junior [replacements]." 109 S. Ct. at 1231. In addition, "[s]hould any vacancies develop * * *, reinstated full-term strikers who have bid on those vacancies will maintain their priority over junior [replacements]." *Ibid.* The only permanent effect of the order and award is that, in the absence of a reduction in force, the pilots who worked during the strike will retain the favorable positions they obtained during the strike, even if more senior full-term strikers are thereby forced to remain in less desirable jobs. This effect, however, is simply the result of the rule of *NLRB* v. *MacKay Radio & Telegraph Co.*, combined with an agreement reached against a background of legal uncertainty as to whether the 85-5 bid positions had been filled by the "awards" to replacement workers. The union's consent to that agreement thus does not establish "discrimination" that would constitute a breach of the union's duty of fair representation.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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